Supreme Court, U.S.
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In the

Supreme Court of the United States

MARILYN T. STONE and CHARLES E. FRYE, in their individual capacities as police officers for the City of Atlanta,

Petitioners,

v.

TABITHA JONES, in her capacity as the wife of ALLISON JONES, deceased, and the ESTATE of ALLISON JONES, et al.,

Respondents.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the ruling by the Eleventh Circuit overturns Georgia law, O.C.G.A. § 17-4-20 and a long line of cases decided by Georgia's highest courts.

2. Whether a law enforcement officer who witnesses a crime occurring outside her jurisdiction acts within her discretionary authority, entitling her to qualified immunity, when she uses deadly force to protect herself, her partner and innocent citizens?

3. Whether the ruling by the Eleventh Circuit misapplies the law governing qualified immunity as set forth in *Saucier* in that the court relied on a case decided in 2003 to determine whether the law was clearly established regarding an incident that occurred in 2002.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner, Marilyn T. Stone is a 33-year veteran of the City of Atlanta Police Department. Petitioner, Charles E. Frye retired from the City of Atlanta Police Department in 2003 after 30 years of service.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Marilyn T. Stone, an officer for the City of Atlanta Police Department ("APD") and Charles E. Frye, an officer, now retired, from the APD, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It is reproduced in the Appendix at 3a-11a. The opinion of the District Court is unreported and reproduced in the Appendix at 14a-26a.

JURISDICTION

On August 9, 2006, the Eleventh Circuit entered judgment. Officers Stone and Frye filed a timely petition for rehearing en banc on August 30, 2006. The Eleventh Circuit entered an order denying the petition on October 19, 2006. Appendix at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the U.S. Constitution, 42 U.S.C. § 1983 and the Official Code of Georgia Annotated (O.C.G.A.) §17-4-20, set out at Appendix 27a-30a.

I. STATEMENT OF THE CASE

There are two reasons why this Court should grant the petition for certiorari and one reason why this Court should use its plenary powers to reverse:

A. The decision by the Eleventh Circuit conflicts with Georgia law and long line of decisions by Georgia's highest courts.

B. The Eleventh Circuit's decision exacerbates the split in the circuits concerning whether an officer outside her territorial jurisdiction violates the Fourth Amendment when she uses deadly force to protect herself and her partner from deadly force.

C. The Eleventh Circuit's decision misapplies the law governing qualified immunity as set forth in *Saucier* in that the court relied on a case decided in 2003 to determine whether the law was clearly established regarding an incident that occurred in 2002.

First, Georgia law clearly states that police officers have the discretionary authority to make custodial arrests for crimes committed in their presence, including crimes occurring outside the officer's jurisdiction. (O.C.G.A. § 17-4-20; *Delong v. Domenici*, 271 Ga.App. 757, 610 S.E.2d 695 (2005); *State v. Hoover*, 253 Ga.App. 98, 558 S.E.2d 71 (2001), cert. denied; *Page v. State*, 250 Ga.App. 795, 553 S.E.2d 176 (2001); *State v. Gehris*, 242 Ga.App. 384, 528 S.E.2d 300 (2000), cert. denied; *Wells v. State*, 206 Ga.App. 513, 426 S.E.2d 231 (1992); *Wright v. State*, 134 Ga.App. 406, 214 S.E.2d 688 (1975), rehearing denied; *Reed v. State*, 195 Ga. 842, 25 S.E.2d 692 (1943); *Mullis v. State*, 196 Ga. 569, 27 S.E.2d 91 (1943); *Morton v. State*, 190 Ga. 792, 10

S.E.2d 836 (1940)). The Eleventh Circuit decision has overturned this law and precedent.

According to the ruling of the Eleventh Circuit, law enforcement officers who witness a crime occurring outside their jurisdiction and respond to that crime, act *outside* the scope of their authority and are not entitled to qualified immunity. According to the Eleventh Circuit, if one officer's initial response to the witnessed crime is to "render aid" to the offender and the other officer's initial inclination is to investigate the scene with caution; the former vitiates the latter, denying both qualified immunity. According to the Eleventh Circuit, unless both officers were attempting to arrest the offender for the crimes they witnessed *outside* their jurisdiction, the officers were acting outside the scope of their authority and thus, are not entitled to qualified immunity.

The Eleventh Circuit relied on *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995), a case involving the authority of a court-appointed guardian ad litem. By relying on *Lenz*, the Eleventh Circuit's decision short circuits traditional qualified immunity analyses in Fourth Amendment cases. In essence, the Eleventh Circuit's decision, conflates a guardian ad litem with a law enforcement officer and holds that the latter has "no more authority than an ordinary citizen" when acting outside their jurisdiction, even if authorized by state law. This result contradicts seventy years of Georgia law and a long line of decisions by Georgia's highest courts. (Citations *supra*.)

Second, the Eleventh Circuit's ruling in this case also exacerbates a split in the circuits concerning whether a law enforcement officer who witnesses a crime occurring outside her jurisdiction violates the Fourth Amendment when she uses deadly force to protect herself, her partner and innocent

citizens. The Sixth, Eighth and Ninth Circuits have addressed whether law enforcement officers may use deadly force when a suspect drives in a manner that places the lives of innocent citizens or the officers in danger. The decision of the Eleventh Circuit conflicts with the decisions of the Sixth, Eighth and Ninth circuits. Without a clear pronouncement from the Supreme Court, the outcome in similar cases will continue to vary from circuit to circuit and state to state.

Third, the Eleventh Circuit's decision misapplies the law governing qualified immunity as set forth in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151. In its determination as to whether the law was clearly established on July 2, 2002, the date of the incident, the Eleventh Circuit relied upon a case decided in 2003 -- *Vaughan v. Cox*, 343 F.3d 1323, 1329 (11thCir. 2003).

Finally, the Eleventh Circuit's decision has far reaching public policy implications that blur the line between federal and state authority regulating *intrastate* law enforcement. Should states with limited law enforcement resources be allowed to define and legislate, within their own boundaries, the scope of police authority? With regard to implications of the Fourth Amendment, does the state define the scope of authority of its law enforcement officers or is this function now within the purview of the federal courts?

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 2, 2002, at approximately 10:45 a.m., City of Atlanta Police officers Marilyn Stone and Charles Frye were on-duty. The officers were in their patrol car, stopped at a red traffic light at the intersection of Harrison Road and Virginia

Avenue in College Park, Georgia.[1] The officers observed Allison Jones in a white Lincoln Navigator driving ***eastbound in the westbound lane*** at a ***high rate of speed.*** The Navigator passed the patrol car, ***ran through the red light*** and attempted to turn onto the Interstate 85 expressway southbound toward Hartsfield-Jackson International Airport. Unable to maneuver the turn due to its speed, the Navigator crashed into the I-85 guardrail located approximately one block from the officers. Both officers witnessed the entire incident. Officer Stone, thinking she was in Hapeville, radioed Hapeville Police, then drove the short distance to the crash scene with her patrol car's siren and blue police lights on. Officer Stone parked the marked police car at a 45-degree angle from the right rear corner of the Navigator. R-24 at 36-3-11; R-19 at 40, 41, and 139; R-18 at 16 and 39.

Officer Stone approached the driver's side window and verbally commanded Jones to exit the vehicle. Although the airbags had deployed, Jones did not appear to be injured. Although the vehicle had crashed, the engine was still running. Jones looked at Stone in a menacing fashion, but otherwise did not respond to her commands. R-24, p. 36-3-11; R-19, pp. 35-37, 60, 61, 66, 80, 144. Officer Frye also commanded Jones to exit the vehicle. R-24, p. 35-4-12; R-18, pp. 31, 39. When Jones did not respond to her commands, Stone moved away from the vehicle and stepped

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[1] The municipal boundaries of four cities –Atlanta, College Park and East Point, Hapeville – converge near this incident. The intersection of Harrison Road and Virginia Ave. borders two cities -- East Point, Georgia and College Park, Georgia. The officers were on the College Park side of the street. The Atlanta officers were assigned (jurisdiction) to Hartsfield-Jackson Airport, 1.8 miles away. Hartsfield –Jackson International Airport is a non-contiguous area of the City of Atlanta.

back toward the rear because she felt she was in danger. Officer Stone positioned herself to the left of Officer Frye to the side and rear of the vehicle. R-24, p. 36-3-11, p. 35-4-12; R-19, p. 41; R-18, pp. 20, 26, 27. Officer Frye asked Jones to exit the vehicle again. The engine was still running. Jones shook his head from left to right indicating that he would not get out of the car. R-24, p. 35-4-12; R-18, pp. 34, 35.

Officer Frye could see the driver's eyes in the rear view mirror watching the officers. Jones was aware that the officers were behind and adjacent to the vehicle. Abruptly and without warning, Jones put the car into reverse and rapidly accelerated. R-24, p. 35-4-12; R-19, pp. 80, 81, 85, 86, 156; R-18, pp. 53, 54, 59, 72, 73. The Navigator lunged backwards toward both officers, placing them both in imminent danger. Officer Stone quickly pivoted to her left stumbling to the ground while pulling out her firearm. Officer Stone, believing she heard gunfire, advised radio: "shots fired." R-24, p. 35-4-12; R-19, pp. 98, 100, 109, 151, 178; R-18, pp. 57, 68. Officer Frye dove from behind the vehicle and also heard shots fired. (Neither officer could see the other for a brief moment.) Officer Frye steadied himself to the right; Officer Stone to the left. R-24, p. 35-4-12; R-19, pp. 92, 93, 94, 99, 103; R-18, pp. 54, 55. Both officers feared injury by the erratic driver and the vehicle. R-24, p. 36-4-11, p. 35-4-12; R-19, pp. 106, 125, 126, 159, 168; R-18, p. 57.

As the officers scrambled to avoid being hit by the moving vehicle, Officer Stone discharged her weapon at the vehicle. R-24, p. 36-4-11; R-19, p. 97, 111, 168. Officer Frye discharged his firearm at the suspect. The driver continued to accelerate in reverse over the island striking the patrol car. R-24, p. 35-4-12; R-19, pp. 102, 106-7, 120, 121-125, 127;

R-18, pp. 69, 70. Jones quickly shifted gears and accelerated directly toward the officers. The officers fired again as the vehicle headed directly toward them. Officer Frye fired at the driver through the front windshield and through the driver's side window. R-24, p. 36-4-11, p. 35-4-12; R-19, p.106, 125-126, 159, 168; R-18, p. 57. After the shots were fired, the driver swerved, narrowly missing the officers, then sped away eastbound on Virginia Avenue. Officers Stone and Frye returned to their patrol car and proceeded eastbound on Virginia Avenue. R-24, p. 35-4-12. Eleven eyewitnesses observed the entire incident. Nine eyewitnesses corroborated the officer's version of events. None of the eyewitnesses disputed the direction of Jones vehicle as he sped away. (See generally eyewitness statements: R-24, pp. 6-1-1, 8-1-1, 10-1-1, 12-1-1, 13-1-1, 14-1-1, 19-1-1, 22-1-1, 25-1-2, 26-1-3, 28-1-1, 29-1-1, 31-1-1.)

The incident occurred within the city limits of East Point, Georgia. The East Point police department contacted the Georgia Bureau of Investigation ("GBI") to investigate the scene. Subsequently, the GBI performed a toxicology analysis on Jones. The analysis revealed that Jones tested positive for both alcohol and cocaine. Both substances were in his system at the time of the incident: Cocaine, 1.5 mg/L (=/-22%); Coca ethylene, 30 micrograms/lite (=/-22%); Benzoylecgonine (a metabolite of cocaine), .8 mg/L (=/-22%); Alcohol, .028 grams per 100/ml. R-24, Lima Affidavit, p. 48-2-5.

GBI Crime Scene Specialist/Special Agent Tony Lima investigated the crime scene and recovered a partial crack pipe and a pink colored bag that is commonly used to package crack cocaine. The agent also recovered a Miller Genuine Draft 22-ounce bottle, Colt 45 Beer Top, Icehouse Beer Cap and a 16-ounce Wildcat Malt Liquor can from the interior of

the Navigator with a receipt showing a beer/wine purchase from that same morning, July 2, 2002 at 0856 hours. R-24, p. 47-26-47.

At the time of the incident, Jones was on probation for a 2001 narcotics conviction. R-24, p. 5-1-5 thru 5-5-5.

The Fulton County Medical Examiner's Report indicated that there was a penetrating/perforating gunshot wound to the *front* chest and the right wrist. GBI's laboratory determined that the fatal shot to the chest came from Officer Frye's weapon. The injury to the right wrist was inflicted by Officer Stone. R-24, Lima Affidavit. The forensic evidence was undisputed.

The shooting incident was investigated by the GBI, the East Point Police Department and by the Atlanta Police Department's Office of Professional Standards (OPS). The East Point Police Department concluded: "Officers Frye and Stone did feel that their lives were in danger to the point of serious bodily injury was (sic) going to occur from the actions of Allison Bernard Jones. Jones was driving a vehicle in a manner that at the time would make one reasonably believe that the vehicle was being used as a deadly weapon." R-24, p. 37-1-4 thru 37-34-34.

Both Stone and Frye were veteran officers assigned to the Hartsfield-Jackson International Airport, which was located 1.8 miles away from the scene. Petitioner, Marilyn T. Stone is a 30-year veteran of the City of Atlanta Police Department. Petitioner, Charles E. Frye retired from the Department in 2003 after 30 years of service.

A. Proceedings of the United States District Court

The District Court granted summary judgment to the City of Atlanta and the officers holding that officers Stone and Frye did not violate Jones' Fourth Amendment rights, and even if they had, the officers were entitled to qualified immunity.

The district court began its qualified immunity analysis by acknowledging Georgia law, i.e., O.C.G.A § 17-4-20 and case precedent. In Georgia, law enforcement officers have the authority to make custodial arrests for crimes committed in their presence and this authority extends outside the officer's jurisdiction. (Citations supra). Appendix at 27a-30a.

The District Court acknowledged the undisputed facts: "The officers observed Allison Jones in a white Lincoln Navigator driving ***eastbound in the westbound lane*** at a ***high rate of speed.*** The navigator ***passed the patrol car***, ***ran through the red light*** and attempted to turn onto the Interstate 85 expressway southbound toward Hartsfield-Jackson International Airport. Jones lost control of his car and crashed into the I-85 guardrail located approximately one block from the officers." Appendix at 15a-16a.

The District Court applied *Saucier's* two-step analysis as a template for its qualified immunity analysis. The District Court also relied on *Robinson v. Arrugeta*, 415 F.3d 1252, at 1255 (11th Cir.2005) (quoting *Saucier*, at 201, 121 S.Ct. at 2156). The District Court stated that "[I]n light of the suspect's *prior* hazardous driving, the *Pace* court held that the suspect had used his 'automobile in a manner to give reasonable policemen probable cause to believe that it had become a deadly weapon with which [the suspect] was armed and that use of deadly force in that situation did not violate

Fourth Amendment standards.'" *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002). Appendix at 22a. The District Court found no clearly established law that precluded the officers from using deadly force when confronted with deadly force as was permitted in *Pace* and *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596 (2004) and concluded that the officers were entitled to qualified immunity.

The District Court acknowledged the standard for evaluating a motion for summary judgment – to view the evidence in a light most favorable to the non-movant. Appendix at 18a. The District Court did not place much emphasis on the conflicting testimony of two of the eleven eyewitnesses stating that, "Rule 56 'by its very terms . . . provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.' *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247-8, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (emphasis in the original).'" Further the District Court stated that "'an issue is not genuine if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id.* at 249-50, 106 S.Ct. at 2511. The District Court concluded by stating that: "substantive law will identify which facts are material. *Id.* at 248, 106 S.Ct. at 2510. Appendix at 18a.

The District Court acknowledged Georgia law and controlling precedent, ignored the subjective intent of one of the officers and properly concluded that Officers Marilyn Stone and Charles Frye did not violate Jones's Fourth Amendment rights and, even if they had, the District Court concluded officers would be entitled to qualified immunity. Appendix at 19a.

B. Proceedings of the Eleventh Circuit Court of Appeals

Jones appealed the District Court's grant of summary judgment to the City of Atlanta and Officers Marilyn Stone and Charles Frye. The Eleventh Circuit affirmed in part, reversed in part, vacated in part, and remanded to the District Court. The Eleventh Circuit affirmed summary judgment for the City of Atlanta on Jones's 42 U.S.C. § 1983 claims. The court reversed the grant of summary judgment as to the § 1983 claims against Officers Stone and Frye in their individual capacities and vacated dismissal of the state law claims. The Eleventh Circuit instructed the District Court to reconsider the question of whether to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Jones' state law claims. Appendix at 11a.

Relying on *Lenz v. Winburn,* 51 F.3d 1540 (11th Cir. 1995) the Eleventh Circuit denied qualified immunity to the officers. The *Lenz* Court held that a court-appointed guardian ad litem who acted outside the scope of her authority was not entitled to qualified immunity. *Id.* 51 F.3d at 1547. The Eleventh Circuit analogized *Lenz's* facts to the instant case and held that an officer who witnesses a crime outside that officer's jurisdiction has no legal authority to act and, if the officer does act, the officer will not be entitled to qualified immunity.

The Eleventh Circuit relied on the deposition testimony of Dr. Richard Clark, Director of Planning and Research for the City of Atlanta, a non-lawyer, who stated that police officers have only the same authority as ordinary citizens when they are outside the territorial jurisdiction of the City of Atlanta. Although the Court cited O.C.G.A. § 17-4-20, which authorizes police officers to arrest those committing crimes in

their presence, even if the crime is committed outside their jurisdiction, the Eleventh Circuit held that Officers Stone and Frye did not contend that they were arresting Jones. "Instead," stated the Court, "they have maintained they intended to render [the offender] aid.[2] Appendix at 10a.

The Eleventh Circuit then cited *Vaughan v. Cox*, 343 F.3d 1323, 1329 (11th Cir. 2003), to support its holding that the law was clearly established in this circuit "that shooting into a vehicle moving at high speed would be an unreasonable use of force violating the Fourth Amendment rights of a victim harmed by the shooting if the use of the vehicle did not present an immediate threat of serious harm at the time the officer fired." Appendix 8a. [*Vaughan* was decided in 2003. The incident involved here occurred in 2002. Officer Frye retired from the Atlanta Police Department in 2003, before the *Vaughan* case was decided.[3]]

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[2] Officer Stone stated in a deposition that her first impulse when she witnessed the erratic driving and the subsequent crash was to render aid. Officer Frye stated his intent was to investigate the suspicious and reckless driving. The Eleventh Circuit concluded that if one officer's intent was to render aid, the officers were not engaged in the discretionary act of arresting Jones. Petitioners believe this is error: the subjective intent of the police officer is irrelevant to the analysis of qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 641,107 S.Ct. 3034 (1978); *Whren v. U.S.*, 517 U.S. 806, 116 S.Ct. 1769 (1996).

[3] At the time of the incident, and as more fully stated below, the clearly established law in the Eleventh Circuit was *Pace v. Capobianco*, a 2002 case which held that "in light of the suspect's **prior hazardous driving** . . . the suspect had used his automobile in a manner to give reasonable policemen probable cause to believe it had become a deadly weapon with which the suspect was armed and . . . the use of deadly force in that situation did not violate the

Officers Stone and Frye filed a timely petition for rehearing en banc. The Eleventh Circuit denied the petition on October 19, 2006.

III. REASONS FOR GRANTING THE PETITION

A. THE DECISION CONFLICTS WITH THE STATE LAW OF GEORGIA AND DECISIONS OF GEORGIA'S HIGHEST COURTS

A writ of certiorari is warranted because the Eleventh Circuit decision conflicts with Georgia law and a long line of decisions by Georgia's highest courts. The decision by the Eleventh Circuit regarding the scope of authority given to state law enforcement officers outside their jurisdiction conflicts with settled law in Georgia.

The Official Code of Georgia Annotated § 17-4-20(a) states in pertinent part: "An arrest for a crime may be made by a law enforcement officer either under a warrant or without a warrant if the offense is committed in such officer's presence or within such officer's immediate knowledge . . . ." O.C.G.A. § 17-4-20(a).

The statute codifies a long line of Georgia cases beginning with some early decisions by the Georgia Supreme Court: *Morton v. State*, 190 Ga. 792, 10 S.E.2d 836 (1940) ("an arrest for a crime may be made by an officer, either under a warrant, or without a warrant, if the offense is committed in his presence or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant."); *Reed v. State*, 195 Ga. 842, 25

Fourth Amendment." *Pace v. Capobianco*, 283 F.3d 1275, 1280-82 (11th Cir. 2002).

S.E.2d 692 (1943) ("when a crime is committed in an officer's presence, it is not only his right but his duty to arrest without a warrant."); *Mullis v. State*, 196 Ga. 569, 27 S.E.2d 91 (1943) ("A city police officer has authority to arrest without a warrant one who violates a state statute in his presence or to so arrest within city one who violates a city ordinance in his presence.").

Recent decisions by Georgia's Court of Appeals have further interpreted O.C.G.A. § 17-4-20 as follows: *Wells v. State*, 206 Ga.App. 513, 426 S.E.2d 231 (1992) ("Law enforcement officer may make an arrest without a warrant for an offense committed in his presence, even if the arrest is outside his jurisdiction."); *The State v. Gehris*, 242 Ga.App. 384, 528 S.E.2d 300 (2000) and *Page v. State*, 250 Ga.App. 795, 553 S.E.2d 176 (2001)) ("[A] police officer has authority to arrest a person accused of violating any law or ordinance governing the operation of a vehicle where the offense is committed in his presence, regardless of territorial limitations."); *Delong v. Domenici*, 271 Ga.App. 757, 610 S.E.2d 695 (2005) ("[A] police officer's statutory authority to make custodial arrests for crimes committed in their presence extends outside the officer's jurisdiction."). It is long settled law in Georgia that law enforcement officers, unlike guardians ad litem, have a *full-time duty* to maintain the peace and the decision to arrest is a discretionary act requiring the officer's personal deliberation and judgment. *Carr v. State*, 176 Ga.App. 113, 335 S.E.2d 622 (1985); *Reed v. Dekalb County*, 264 Ga. App. 83, 589 S.E. 2d 584, 03 (2003).

Under federal law, in order to receive qualified immunity, the public official must first prove she was acting within the scope of her discretionary authority when the allegedly wrongful acts occurred. (Citations omitted). The District Court cited O.C.G.A § 17-4-20(a) and relied on the exigent

circumstances to frame its qualified immunity analysis, i.e., the officers witnessed Jones driving ***eastbound in the westbound lane*** at a ***high rate of speed.*** The Navigator passed the patrol car, ***ran through the red light*** and **crashed** while attempting to turn onto the Interstate 85 expressway southbound toward the airport. The Eleventh Circuit ignored the exigent circumstances. The Eleventh Circuit relied on the statement of Dr. Clark and focused on the fact that Officer's Stone and Frye were 1.8 miles outside their territorial jurisdiction and erroneously focused on the subjective intent of Officer Stone to "render aid" to the driver, as opposed to initially attempting an arrest. The Eleventh Circuit interpreted Stone's testimony to mean that since the officers were not attempting to arrest Jones they had "no more authority than an ordinary citizen." Officer Frye clearly stated that his initial inclination was to investigate the offender's reckless and dangerous driving and possibly arrest, if appropriate.

The Eleventh Circuit's reliance on *Lenz* and the subjective intent of one officer is error. This Court has held that subjective intentions play no role in determining whether officers had probable cause to arrest or whether they were in compliance with state law. *Ohio v. Robinette*, 519 U.S 33, 38, 117 S.Ct. 417, 421; *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996); *Scott v. U.S.*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723-1724. In its reliance on *Lenz*, the Eleventh Circuit improperly equates a guardian ad litem, a court-appointed official with limited authority and discretion, to a law enforcement officer whose authority and broad discretion is defined by state law. The Eleventh Circuit's expansion of *Lenz's* principles to on-duty police officers strangles current state law principles and is a disservice to the law enforcement community. Neither this Court, nor any other circuit has blatantly stripped a law enforcement officer

of his authority to investigate criminal activity. *See Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 l.Ed.2d 288 (1967); *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

The Eleventh Circuit's decision replaces the collected wisdom of Georgia's highest courts and the state legislature. Petitioners believe this is error. This Court should use its plenary powers to reverse the ruling of the Eleventh Circuit on this issue and hold:

> If authorized by state law, a law enforcement officer who witnesses a crime outside her immediate territorial jurisdiction, but within the confines of the state, acts within the scope of her official discretionary authority for the purpose of qualified immunity.

B. THE ELEVENTH CIRCUIT'S DECISION EXACERBATES THE SPLIT IN THE CIRCUITS CONCERNING WHETHER AN OFFICER ACTING OUTSIDE OF HER TERRITORIAL JURISDICTION NECESSARILY VIOLATES THE FOURTH AMENDMENT WHEN SHE USES DEADLY FORCE TO PROTECT HERSELF AND HER PARTNER FROM DEADLY FORCE.

The Eleventh Circuit's denial of qualified immunity to Officers Stone and Frye who witnessed a crime occurring outside their territorial jurisdiction based on the premise that Officer Stone was acting outside the scope of her authority because she indicated that her initial reaction was to render aid versus immediately arrest is an issue of first impression for this court.

The Eleventh Circuit's decision on when deadly force is appropriate conflicts with the decisions of other circuits and this court. This court, the Sixth, Eighth and Ninth Circuits have addressed whether law enforcement officers may use deadly force when a suspect drives in a manner that places the lives of innocent citizens or the officers in danger. The Eighth Circuit in *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) held that an officer's decision to shoot the driver of a speeding tractor-trailer who had made several dangerous maneuvers toward officers and other motorists did not violate the Fourth Amendment. The Court stated that the "officer had probable cause to believe that the truck posed an imminent threat of serious bodily harm to innocent motorists as well as to the officers themselves." *Id.*, 993 F.2d at 1330-33. The Sixth Circuit in *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) held that after a recklessly driven car crashed into a guardrail, the officer did not violate the offender's Fourth Amendment rights when she shot into the car as it tried to resume its reckless driving. *Id.*, 205 F.3d at 877. On similar facts, the Sixth Circuit in *Smith v. Freeland*, 954 F.2d 343, 347-8 (6th Cir. 1992) noted that "a car can be a deadly weapon' and held that the officer's decision to shoot and stop the car from possibly injuring others was reasonable. *Id.*, 954 F.2d at 347-8. This Court in *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596 (2004), a case originating in the Ninth Circuit, held that law enforcement officers may use deadly force when a suspect appears *likely to continue driving* in a manner that places the lives of officers and innocent bystanders at risk. In *Brosseau*, after the Ninth Circuit reversed the district court's grant of qualified immunity to Officer Brosseau, this Court summarily reversed the Ninth Circuit in order to "correct a clear misapprehension of the qualified immunity standard." *Id.* 533 at 198, 125 S.Ct. at 598. In an action involving a recklessly driven vehicle that posed a threat to the officers and innocent citizens, this Court

held that it was not clearly established, in a particularized sense, that the officer violated the Fourth Amendment's deadly force standards by shooting the suspect as he fled in the vehicle, given the risk posed to persons in the immediate area. *Id.* 533 U.S. at 201, 125 S.Ct. at 600. The decision by the Eleventh Circuit conflicts with the decisions of this Court, the Sixth and Eighth circuits and continues to obfuscate the issue surrounding the use of deadly force by law enforcement in similar circumstances.

C. THE ELEVENTH CIRCUIT'S DECISION MISAPPLIES THE LAW GOVERNING QUALIFIED IMMUNITY AS SET FORTH IN *SAUCIER* IN THAT THE COURT RELIED ON A CASE DECIDED IN 2003 TO DETERMINE WHETHER THE LAW WAS CLEARLY ESTABLISHED REGARDING AN INCIDENT THAT OCCURRED IN 2002.

In addition to exacerbating the split in the circuits, the Eleventh Circuit decision misapplies the principles of qualified immunity and precedent of this Court. In a suit against an officer for an alleged violation of a constitutional right, this Court has held that the requisites of a qualified immunity defense must be considered in proper sequence. *Saucier*, 533 U.S. at 200, 121 S.Ct at 2155. "In order to receive qualified immunity, the law enforcement officer must first prove he was acting within the scope of his discretionary authority when the wrongful acts occurred." (Citations omitted.) After a determination is made of the officer's authority, "[T]he threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 735 (2002) (citing *Saucier*, 533 U.S. at 194). "If a constitutional right would have been violated

under the plaintiff's version of the facts, 'the next, sequential step is to ask whether the right was clearly established.'" *Saucier*, 533 U.S. at 201. In other words, "the salient question" is whether the state of the law at the time of the incident gave the law enforcement officers "fair and clear warning" that their conduct with respect to the plaintiff was unconstitutional. *Hope*, 536 U.S. at 746 (citing *United States v. Lanier*, 520 U.S. 259 (1997)).

Applying the parameters set forth in *Saucier*, regarding whether an officer is acting within the scope of her discretionary authority, the Eleventh Circuit's decision here conflicts with Supreme Court precedent which requires courts to judge an officer's use of force from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight. *Graham v. Conner*, 490 U.S. 386, 369-9 (1989).

In *Terry v. Ohio*, 393 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), Chief Justice Warren recognized that a police officer has limited authority to make investigatory stops of individuals engaged in suspicious behavior which may not rise to the level of probable cause for an arrest. *Id.* at 22, 88 S.Ct. 1868. The *Terry* Court further held that, in conducting an investigation, the officer could properly take whatever action was reasonably necessary to assure his safety and the safety of others. The *Terry* Court quoted *Adams v. Williams*, 407 U.S. 143, 145, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) and stated: "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." According to the *Terry* Court, if Officer Stone and Frye possessed sufficient facts 'to conclude in light of their experience that criminal activity may be afoot,' they had a duty to investigate. *Id.*, at 30, 88 S.Ct. 1868. (*See* also

Palmer v. City of Euclid, 402 U.S. 546, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971) ("a policeman has a duty to investigate suspicious circumstances . . .")

The District Court began its legal assessment from the beginning of the incident, that is, from the time Officers Stone and Frye first witnessed Jones's reckless driving -- eastbound in the westbound lane at a high rate of speed, rushing past the police car, running through a red light and crashing into the I-85 guardrail -- all within a heavily populated commercial area 1.8 miles from Hartsfield-Jackson International Airport, their assigned jurisdiction. Clearly the facts demonstrate that Jones posed a threat to public safety by his reckless driving and subsequent crash. These exigent circumstances made it clear to the District Court that the officers had probable cause to investigate. The Eleventh Circuit, however, improperly ignored the exigent circumstances and focused on geography, jurisdiction and the subjective expressed intent of Officer Stone, i.e., to "render aid" to the driver, as opposed to attempting an arrest. The Eleventh Circuit improperly focused on Officer Stone's initial inclination, not the surrounding facts, not the totality of circumstances.

The approach taken by the Eleventh Circuit in the case at bar is similar to the approach taken by the Ninth Circuit in *Saucier*. The Court of Appeals in *Saucier* denied summary judgment because a material issue of fact remained on the excessive force claim. This Court held that the approach adopted by the Court of Appeals could undermine the goal of qualified immunity. *Saucier*, 533 U.S. at 195, 121 S.Ct. 2153. In the case at bar, the Eleventh Circuit first, ruled that the right was clearly established; and second, that because of the unresolved factual issues on the excessive force claim, it need not consider reasonableness or any further aspects of

qualified immunity. Petitioners believe this is error and contradicts the standard applied in *Saucier*.

The deference owed officers facing suits for alleged excessive force is not different in some qualitative respect from the probable cause inquiry in *Anderson v. Creighton*, 483 U.S. 635,107 S. Ct. 3034 (1987). A law enforcement officer can have a reasonable, but mistaken belief as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that he has violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment . . . *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. *Anderson*, 483 U.S. at 643.

The determination that a constitutional right has been violated or that the issue is a question for the jury, does not end the Court's analysis. As stated in *Anderson*, assuming that a constitutional violation is established, the second prong of qualified immunity analysis must be addressed: whether the right was clearly established must be considered on a more specific level. *Anderson*, 483 U.S. at 635.

As this Court stated in *Brosseau*, quoting *Saucier*, "[b]ecause the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at the time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brousseau*, 543 U.S. at 599. "It is important to emphasize that this inquiry 'must be undertaken in light of the specific context of the case, not as a broad general

proposition.'" *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. As we have previously said in this very context:

> "[T]here is no doubt that *Graham v. Conner, supra*, clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson [v. Creighton,]* 'that the right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' 483 U.S. [635,] 640[, 107 S.Ct. 3034, 97 L.Ed2d 523 (1987)]. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*, at 201-202, 107 S.Ct. 3034.

Here the District Court relied on the law of the Eleventh Circuit at the time of the incident, *Pace v. Capobianco*, 283 F.3d 1275, 1281 (11th Cir. 2002), in formulating its opinion. *Pace* involved a reckless and dangerous driver who was cornered by officers on a dead-end street after leading them on a wild 15 minute chase. The suspect remained in his car with the engine running. Law enforcement officers yelled at the suspect to get out of the car. Within a few seconds an officer fired two shots at the suspect through the front windshield. As the car moved forward officers fired again, killing the suspect. In *Pace*, the suspect did not aim his car at the officers nor try to run them over. The suspect "left the street and had driven through residential yards" earlier in the chase. The court stated the officers could not tell if the chase

was actually over. In light of the *suspect's prior hazardous driving*, the *Pace* court held that the suspect had used his "automobile in a manner to give reasonable policemen probable cause to believe that it had become a deadly weapon with which the suspect was armed and that use of deadly force in that situation did not violate the Fourth Amendment. *Id.* at 1280-2.

The Eleventh Circuit ignored *Pace*. In holding that the law was clearly established, the Eleventh Circuit relied on *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003). *Vaughan was decided in 2003. The incident involved here occurred in July 2002.* Officer Frye retired from the Atlanta Police Department in 2003, *before* the *Vaughan* case was decided. At the time of the incident, and as more fully stated above, the clearly established law in the Eleventh Circuit was *Pace v. Capobianco*, a 2002 Eleventh Circuit case which held that the suspect's prior hazardous driving would give reasonable police officers probable cause to believe his vehicle had become a deadly weapon and that use of deadly force in that situation did not violate the Fourth Amendment.

Was the law "clearly established" at the time of this incident such that every reasonable officer would know his conduct violated the Fourth Amendment? (*See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (if "officers of reasonable competence could disagree on the issue, immunity should be recognized"). Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. *Saucier*, 533 U.S. at 206, 121 S.Ct. 2151. Qualified immunity operates in these cases just as it does in others, "to protect officers from that sometimes 'hazy border between excessive and acceptable force'").

Priester v. Riviera Beach, 208 F.3d 919, 926-27 (11th Cir. 2000).

Given the exigent circumstances, the law at the time of the incident, Officers Stone and Frye could reasonably have believed that the use of deadly force was appropriate. The Eleventh Circuit's denial of qualified immunity without undertaking the systematic process as dictated by *Saucier* and *Anderson* is a misapplication of the standards and principles of qualified immunity. The Eleventh Circuit's reliance on a case decided in 2003 to determine whether the law was clearly established in an incident that occurred in 2002 is error and should be summarily reversed.

IV. CONCLUSION

This case has far-reaching public policy implications for law enforcement in deadly force cases and for states with limited law enforcement resources. The decision by the Eleventh Circuit limits a states ability to define the scope of authority of its law enforcement officers who witness a crime within state borders. The Eleventh Circuit's decision strips state legislatures of their sovereign rights, duties and responsibilities to license law enforcement officers and define the scope of authority for any crimes committed within the borders of the state.

Forty years ago, Chief Justice Warren stated: "[A] policeman's lot [should not] be so unhappy that he must choose between being charged for dereliction of duty if he does not arrest when he has probable cause, and being mulcted for damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). That is exactly what the decision by the Eleventh Circuit portends. Can a law enforcement officer rely on her own state's law to

define her scope of authority? Or, is this function now within the purview of the federal courts? Given the exigent circumstances presented above and the state of the law at the time of the incident, could not a reasonable law enforcement officer in Georgia have believed that she had the discretionary authority to act if she witnessed a crime outside her territorial jurisdiction?

The decision of the Eleventh Circuit severely impacts law enforcement in Georgia. Georgia law enforcement officers cannot abide by O.C.G.A. § 17-4-20 for fear that they may face personal liability. Now, the controlling law in this circuit is that if officers act outside their territorial jurisdiction, they are not entitled to qualified immunity when the situation rises to the level it did in the instant case. Because of the Eleventh Circuit's holding, state legislatures have been denied an essential tool that for years *increased* the number of on-duty law enforcement officers on the street, protecting the public. Faced with mounting budget pressures and increased crime, state legislators must now redefine the scope of authority provided to law enforcement officers. Other states with similar statutes may be similarly affected. (*See* Arkansas, A.C.A. § 16-81-106; Alabama, Ala. Code 1975 § 15-10-3; Delaware, 11 Del.C. §§ 1904, 1911; Michigan, M.C.L.A. §764.2a; Missouri, V.A.M.S. § 479.110; New Jersey, N.J.S.A. § 2C:104-5; Oregon, O.R.S. § 133.310; South Carolina, SC ST § 56-7-15; Texas, C.C.P. Art. 14.03; and Utah, U.C.A. 1953 S 77-9-3.)

Neither this Court, nor any other circuit has blatantly stripped state legislators of their ability to define the scope of authority of law enforcement officers within their own state. Above and beyond the interests of the parties to this lawsuit, the law enforcement community and the local public are not served by a ruling that effectively *reduces* the number of on-

duty law enforcement officers and further constricts the veneer of safety that shields the general public.

For the reasons set forth above, Officers Marilyn Stone and Charles Frye, respectfully request that the decision of the Eleventh Circuit be summarily reversed, or alternatively, that a writ of certiorari be granted.

Respectfully submitted,

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